

Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
THE LIBRARY OF CONGRESS  
Washington, D.C.

Received

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Copyright Royalty Board

In re

DETERMINATION OF ROYALTY  
RATES AND TERMS FOR  
EPHEMERAL RECORDING AND  
DIGITAL PERFORMANCE OF  
SOUND RECORDINGS (*WEB IV*)

Docket No. 14-CRB-0001-WR (2016-2020)

**MOTION IN LIMINE TO EXCLUDE IMPROPER WRITTEN REBUTTAL  
TESTIMONY AND ACCOMPANYING EXHIBITS**

Licensee participants Pandora Media, Inc. ("Pandora") and the National Association of Broadcasters (together, the "Moving Services") respectfully move *in limine* to request that the Copyright Royalty Judges ("Judges") exclude from the forthcoming hearing (i) five exhibits – specifically, five CDs collectively containing more than 700 agreements and associated documents between record companies and various streaming services – included for the first time in the Written Rebuttal Testimony submitted by SoundExchange, Inc. ("SoundExchange") on February 25, 2015, as well as (ii) the corresponding paragraphs of written rebuttal testimony that introduce these agreements in the rebuttal submissions of SoundExchange witnesses Dennis Kooker (final paragraph of p. 20), Aaron Harrison (§ 28), Ron Wilcox (§ 32), Charlie Lexton (§ 64), and Simon Wheeler (§ 30).

**BACKGROUND**

In SoundExchange's written rebuttal testimony, five fact witnesses from different record companies have appended CDs to their testimony containing, in total, 711 license agreements and related documentation primarily entered into with interactive services such as Spotify,

Rhapsody, Google Play, and others. *See* SX EX. 011-RR; SX EX. 018-RR; SX EX. 031-RR; SX EX. 040-RR; SX EX. 045-RR.<sup>1</sup> Those agreements constitute the benchmark offered in the written direct testimony of SoundExchange economist Daniel Rubinfeld—agreements that, for whatever reason, SoundExchange and its various witnesses chose not to include their written direct statement. The five record company witnesses – Messrs. Kooker, Harrison, Wilcox, Lexton, and Wheeler – do not identify any written direct testimony from the Licensee Services that the appended agreements are intended to respond to or rebut. Rather, the witnesses’ sole justification for this belated exhibit-dump consists of a single-sentence, repeated verbatim in each piece of testimony, that the witnesses “understand that the Judges are interested in seeing a robust set of agreements, representing a ‘thick market’ of evidence.” *See, e.g.*, Rebuttal Testimony of Aaron Harrison (“Harrison Rebuttal Testimony”) at ¶ 28 (attaching a CD containing 300 agreements between UMG and/or EMI and various interactive services).<sup>2</sup>

Although not cited directly, the obvious provenance of the quoted “thick market” phrase is the Judges’ Order Denying, Without Prejudice, Motions for Issuance of Subpoenas, an order issued nearly a year ago, on April 3, 2014 (the “April 2014 Order”). There, the Judges noted that benchmark agreements “play a central role in determining the rates and terms that most closely represent those that would be established in the marketplace between willing buyers and sellers.” *Id.* at 4. To that end, the Judges emphasized “the importance of receiving evidence of a ‘thick market’ (*i.e.*, as much contract information as exists)” in assessing the “rates and terms that

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<sup>1</sup> Additionally, a few agreements were included concerning non-interactive services offered by iHeartMedia, Inc. and Nokia MixRadio. *See* SX Ex. 031-RR.

<sup>2</sup> *See also* Rebuttal Testimony of Dennis Kooker (“Kooker Rebuttal Testimony”) at p. 20 (appending CD of 188 “Sony Music agreements with interactive services”); Rebuttal Testimony of Ron Wilcox (“Wilcox Rebuttal Testimony”) at ¶ 32 (appending CD of 149 “relevant Warner agreements with interactive services”); Rebuttal Testimony of Charlie Lexton (“Lexton Rebuttal Testimony”) at ¶ 64 (appending CD of 54 “Merlin agreements with digital music services”); Rebuttal Testimony of Simon Wheeler (“Wheeler Rebuttal Testimony”) at ¶ 30 (appending CD of 20 Beggars Group agreements).

most clearly' reflect the marketplace." *Id.* at 5 (citations omitted). The witnesses do not explain why, if the Judges' order issued six months before the submission of SoundExchange's written direct statement, and if SoundExchange's case centered around the interactive services benchmark, they nevertheless waited until the written rebuttal statement to append hundreds of agreements constituting that benchmark.

### **ARGUMENT**

#### **I. PROPER REBUTTAL TESTIMONY MUST RESPOND TO THE OPPOSING PARTY'S DIRECT TESTIMONY AND IS NOT MEANT TO BOLSTER ONE'S OWN DIRECT CASE**

The Judges have expressly recognized the narrow scope of permissible rebuttal testimony, ruling that rebuttal is (i) properly limited to that which "is responding to issues raised in the direct testimony of witnesses for the party opposite;" and (ii) cannot be used to bolster or amend one's own direct testimony. *See* Order Granting in Part and Denying in Part Music Choice's Motion to Strike and Denying Motion by Sirius XM to Strike SoundExchange's Designation of Previous Testimony in its Written Rebuttal Statement (PSS/Satellite II Docket No. 2011-1 ("*Satellite II*")) at 2 (Aug. 3, 2012) ("*Satellite II* Order"), attached to the Declaration of Todd D. Larson ("Larson Decl."), at Exhibit ("Ex.") A. In the *Satellite II* proceeding, Music Choice had moved to strike portions of the written rebuttal testimony of SoundExchange's economic expert George Ford, arguing that his testimony on the subject of the relationship between relative usage intensity and SoundExchange's proposed royalty rate, and his testimony bearing on a greater-of rate structure, were improper attempts to amend his written direct testimony and did not rebut any material in Music Choice's own written direct statement. The Judges agreed, and struck certain portions of Dr. Ford's rebuttal testimony that "stray[ed] so far from . . . the direct testimony it is offered to rebut as to be nothing more than an untimely addition to his written direct testimony." *Id.*

The Judges also granted Music Choice's motion to strike Dr. Ford's testimony concerning the greater-of formula, noting that "SoundExchange offer[ed] no direct testimony by Music Choice witnesses that Dr. Ford expressly responds to with his opinion that a greater-of rate structure is desirable." *Id.* at 3; *accord Satellite II* Rebuttal Hearing Tr. (8/16/2012) at 3785:2-8 (granting motion to strike rebuttal testimony where proffered testimony was "not responsive to issues raised in direct testimony of the opposing party") (Larson Decl. Ex. B); Docket No. 2005-1 CRB DTRA ("*Webcasting II*") Rebuttal Hearing Tr. (11/22/2006) at 80:15-20 (sustaining objection to rebuttal testimony that "does not address matters raised by the Services in their direct cases") (Larson Decl. Ex. C).

SoundExchange has itself repeatedly advocated these very limits, asserting that the written rebuttal statement "is not an opportunity to submit new direct testimony," and that proffered rebuttal testimony must be stricken where "it is offered only to bolster [a participant's] own direct testimony." *See* SoundExchange's Mot. to Strike Portions of Sirius XM Testimony as Improper Rebuttal (*Satellite II*) at 1, 3 (Aug. 3, 2012) ("SX Motion to Strike Portions") (Larson Decl. Ex. D); *see also* SoundExchange's Mot. To Strike Section II of the Written Rebuttal Testimony of Sirius Satellite Radio Inc.'s and XM Satellite Radio Inc.'s Joint Expert John R. Woodbury (Docket No. 2006-1 CRB DSTRA ("*Satellite I*") at 1 (Aug. 9, 2007) ("SX Motion to Strike Woodbury Section II") (Larson Decl. Ex. E). As SoundExchange has argued, rebuttal testimony does not grant a participant carte blanche to "bolster [its] direct testimony." *See* Larson Decl. Ex. E (SX Motion to Strike Woodbury Section II at 1); Larson Decl. Ex. D (SX Motion to Strike Portions at 8-9).<sup>3</sup>

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<sup>3</sup> *See also Satellite II* Rebuttal Hearing Tr. (8/15/2012) (Larson Decl. Ex. F) at 3674:1-2 (moving to strike because testimony was "not rebutting anything in SoundExchange's direct case"); *Satellite I* Rebuttal Hearing Tr. (8/23/2007) at 6:20-7:4 (arguing testimony was "not proper rebuttal [because] [i]t doesn't

## II. THE JUDGES SHOULD EXCLUDE THE 711 AGREEMENTS AS IMPROPER REBUTTAL EVIDENCE

The inclusion of hundreds of additional agreements is not proper “rebuttal” testimony under the principles set forth above. This material does not respond to or otherwise rebut anything within the Services’ direct cases – or even try. It is simply appended without any attempt to link it to the direct cases of any of the Licensee Services.<sup>4</sup> To the contrary, its purpose clearly is to provide the “backup” for SoundExchange’s principal benchmark – the interactive services agreements – presented in SoundExchange’s own *direct* case by Dr. Rubinfeld and this same group of witnesses.<sup>5</sup> As the Judges have found, and as SoundExchange itself has advocated, such “bolstering” or amending of direct testimony through rebuttal evidence is improper. *See* Larson Decl. Ex. A (*Satellite II Order* at 2) (striking rebuttal testimony as “nothing more than an untimely addition to . . . written direct testimony”); Larson Decl. Ex. E (SX Motion to Strike Woodbury Section II at 1) (“[T]he rebuttal phase of this proceeding is not an opportunity to submit new direct evidence.”).

The rote explanation provided by each of the five relevant witnesses makes this obvious. Each simply parrots the line that he “understand[s] that the Judges are interested in seeing a

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respond to any evidence submitted by SoundExchange during the direct phase of this case. Proper rebuttal is a response to evidence that is submitted in the direct case.”) (Larson Decl. Ex. G).

<sup>4</sup> The closest that SoundExchange comes to providing *some* basis for including these agreements is Mr. Kooker’s averment that they “demonstrate[] a wide range of negotiated rates and terms,” and hence, together with “other evidence,” “demonstrate[] a workably competitive market.” *See* Kooker Rebuttal Testimony at p. 20. Mr. Wilcox similarly and summarily claims that the agreements show a “range of rates and terms.” *See* Wilcox Rebuttal Testimony at ¶ 32. These threadbare observations merely suggest that the agreements purportedly satisfy the Judges’ standard for suitable benchmarks – not that they rebut any aspect of the Services’ direct cases. Moreover, simply dumping hundreds of agreements into the record (even with a range of rates) says nothing about whether or not those agreements were competitively negotiated. The other witnesses, for their part, say nothing at all in this regard. *See, e.g.,* Lexton Rebuttal Testimony at ¶ 64; Wheeler Rebuttal Testimony at ¶ 30.

<sup>5</sup> Messrs. Kooker, Wilcox, and Harrison all submitted written testimony in SoundExchange’s Written Direct Statement that discussed their respective companies’ licenses with on-demand streaming services.

robust set of agreements, representing a ‘thick market’ of evidence.” *See, e.g.*, Harrison Rebuttal Testimony at ¶ 28. This is a direct quote from the Judges’ April 2014 Order—the very first substantive Order issued in this proceeding, issued nearly six months before the submission of the parties’ written direct statements. *See* April 2014 Order at 5. If this is the genuine basis for submitting the agreements – and there is no reason not to take the witnesses’ at their word on this point – it begs the question of why SoundExchange waited until its rebuttal case to respond to the Judges’ imperative. Plainly, SoundExchange was aware that the Judges were interested in such evidence at least as early as the April 2014 Order—more than six months before the submission of its written direct testimony. And there is no indication that SoundExchange did not have these hundreds of agreements available to it at the time it submitted its written direct statement on October 7, 2014. Indeed, at that time, its expert Dr. Daniel Rubinfeld averred that he had analyzed a “set of interactive agreements as benchmarks,” *see* Corrected Testimony of Daniel L. Rubinfeld (Oct. 6, 2014) at pp. 4-5,<sup>6</sup> and Messrs. Kooker, Wilcox, and Harrison each devoted extensive sections of their written direct testimony to discussing precisely these agreements – even attaching limited examples.<sup>7</sup> For unexplained reasons, neither Dr. Rubinfeld nor any other SoundExchange witness sought to include the broader set of these agreements as part of their direct case. If this purported evidence was truly necessary to proving up its direct case – or responding to the Judges’ April 2014 order – SoundExchange could and should have

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<sup>6</sup> Those interactive service agreements that Dr. Rubinfeld purported to analyze (but did not sponsor or attach as evidence) amounted to 45 agreements—just over 6% of the 700-some agreements that SoundExchange now submits. *See* SX Ex. 031-DR (“Category A Benchmark Analysis”); *see also* SX Ex. 037-DR (“List of Reviewed Agreements”).

<sup>7</sup> *See* Direct Testimony of Dennis Kooker (Oct. 6, 2014) at § IV (describing “key components of [Sony’s] deals with directly licensed services”); Direct Testimony of Ron Wilcox (Oct. 6, 2014) at § III (“Overview of [Warner’s] Marketplace Agreements”) and Exs. 1-2; Direct Testimony of Aaron Harrison (Oct. 6, 2014) at § IV (“Important Terms in Universal’s Direct Deals with On-Demand Streaming Services”) and Exs. 2-3.

included it in the record at that time.

That SoundExchange failed to do so does not make the submission of the material proper rebuttal. By its own terms, this testimony (and the underlying 700-plus agreements) has nothing to do with the Licensees' direct testimony.<sup>8</sup> Because neither the "rebuttal" testimony nor the agreements themselves "address matters raised by the Services in their direct cases," *see* Larson Decl. Ex. C (*Webcasting II* Rebuttal Hearing Tr.) at 80:15-20, SoundExchange should be precluded from submitting the agreements at the forthcoming hearing as further support for its benchmark analysis (*i.e.*, solely to "bolster" its direct testimony).

A contrary result is not indicated by the Judges' recent Summary Order denying (in part without prejudice) the Services' motion to strike Dr. Rubinfeld's corrected written rebuttal testimony and Section III.E of his original rebuttal testimony (the "Section III.E Licenses"), and granting other relief to the Services. *See* Summary Order dated March 26, 2015. In that Order, the Judges did not rule that *any* of the material subject to the Services' motion there was proper rebuttal. As to Dr. Rubinfeld's corrected written rebuttal testimony concerning Apple, the Judges deemed any "new or now unredacted information" to be part of SoundExchange's *direct* written testimony, rather than proper rebuttal testimony. As to the Section III.E Licenses, the Judges made no findings as to their propriety, but rather expressly allowed the Services to renew their motion to strike at the hearing or in post-hearing submissions. *Id.* at ¶¶ 2-3. Moreover, the

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<sup>8</sup> Indeed, because SoundExchange's witnesses did not even attempt to show a link between the proffered agreements and anything contained in the Services' direct testimony, SoundExchange cannot be heard to argue (as it recently did in opposing the Services' motion to strike certain of Dr. Rubinfeld's rebuttal testimony) that there is a "nexus" between the agreements and the Services' direct testimony that somehow justify their inclusion as proper rebuttal. Certainly, the agreements do not correct any "purported shortcoming" in the Services' direct testimony, as required by precedent. *Compare* Larson Decl. Ex. A at 2 (finding challenged testimony to be proper rebuttal where it "attempts to show a nexus between the subject in question . . . and a *purported shortcoming* in the approach taken by Music Choice's expert witness") (emphasis added). If anything, SoundExchange has improperly attempted to correct such a "shortcoming" in its *own* direct case.

Judges allowed the Services to take supplemental discovery. *Id.* at ¶¶ 4-6. If anything, the instant motion presents an even stronger instance of improper rebuttal, as SoundExchange has, without explanation or any link to the Services' direct case, simply littered the record with agreements that it could and should have submitted with its direct case.<sup>9</sup> Accordingly, the Moving Services respectfully submit that they should be excluded in their entirety.

### CONCLUSION

SoundExchange's attempt to bolster its benchmark with hundreds of agreements is indicative of its apparent "anything-goes" attitude towards rebuttal testimony – and wholly improper. For the foregoing reasons, the Moving Services respectfully request that the Judges exclude Exhibits SX EX. 011-RR; SX EX. 018-RR; SX EX. 031-RR; SX EX. 040-RR; SX EX. 045-RR, along with the corresponding paragraphs from the testimony of Messrs. Kooker, Wilcox, Harrison, Lexton and Wheeler.

Dated: April 1, 2015

Respectfully submitted,

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<sup>9</sup> Given the sheer volume and breadth of this additional material, and the impending trial dates, any supplemental discovery like that ordered in response to the Services' prior motion would not cure the shortcomings of SoundExchange's submission.



**CERTIFICATE OF SERVICE**

I hereby certify that on April 1, 2015, I caused a copy of the foregoing public version of Pandora Media Inc.'s Motion in Limine to Exclude Improper Written Rebuttal Testimony and Accompanying Exhibits to be served by email and first-class mail to the participants listed below:

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Christopher T. Luise JMU  
Christopher T. Luise

Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
THE LIBRARY OF CONGRESS  
Washington, D.C.

In re	)	
	)	
	)	
DETERMINATION OF ROYALTY	)	Docket No. 14-CRB-0001-WR (2016-2020)
RATES AND TERMS FOR	)	
EPHEMERAL RECORDING AND	)	
DIGITAL PERFORMANCE OF	)	
SOUND RECORDINGS ( <i>WEB IV</i> )	)	
	)	

**DECLARATION OF TODD LARSON IN SUPPORT OF MOTION IN LIMINE  
TO EXCLUDE IMPROPER WRITTEN REBUTTAL TESTIMONY AND  
ACCOMPANYING EXHIBITS**

1. I am counsel for Pandora Media, Inc. ("Pandora") in the above-captioned case. I am familiar with the facts, circumstances, and proceedings in this case and submit this declaration in support of the Moving Services' Motion in Limine to Exclude Improper Rebuttal Testimony and Accompany Exhibits.

2. Attached hereto as Exhibit A is a true and correct copy of an Order Granting in Part and Denying in Part Music Choice's Motion to Strike and Denying Motion by Sirius XM to Strike SoundExchange's Designation of Previous Testimony in its Written Rebuttal Statement in PSS/Satellite II Docket No. 2011-1 ("*Satellite II*"), dated Aug. 3, 2012.

3. Attached hereto as Exhibit B is a true and correct copy of relevant portions of a transcript of proceedings from the *Satellite II* rebuttal hearing, dated August 16, 2012.

4. Attached hereto as Exhibit C is a true and correct copy of relevant portions of a transcript of proceedings from the *Webcasting II* rebuttal hearing, dated November 22, 2006.

5. Attached hereto as Exhibit D is a true and correct copy of SoundExchange's Motion to Strike Portions of Sirius XM Testimony as Improper Rebuttal in *Satellite II*, dated Aug. 3, 2012.

6. Attached hereto as Exhibit E is a true and correct copy of SoundExchange's Motion to Strike Section II of the Written Rebuttal Testimony of Sirius Satellite Radio Inc.'s and XM Satellite Radio Inc.'s Joint Expert John R. Woodbury, in Docket No. 2006-1 CRB DSTR ("Satellite I"), dated August 9, 2007.

7. Attached hereto as Exhibit F is a true and correct copy of relevant portions of a transcript of proceedings from the *Satellite II* rebuttal hearing, dated August 15, 2012.

8. Attached hereto as Exhibit G is a true and correct copy of relevant portions of a transcript of proceedings from the *Satellite I* rebuttal hearing, dated August 23, 2007.

I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: April 1, 2015  
New York, NY

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# Exhibit A

UNITED STATES COPYRIGHT ROYALTY JUDGES

In the Matter of	}	
Determination of Rates and Terms for	}	Docket No. 2011-1
Preexisting Subscription Services and	}	CRB PSS/Satellite II
Satellite Digital Audio Radio Services	}	
	}	

**ORDER GRANTING IN PART AND DENYING IN PART MUSIC CHOICE'S  
MOTION TO STRIKE  
AND  
DENYING MOTION BY SIRIUS XM TO STRIKE SOUNDEXCHANGE'S  
DESIGNATION OF PREVIOUS TESTIMONY IN ITS WRITTEN REBUTTAL  
STATEMENT**

The Copyright Royalty Judges ("Judges") have received a motion from Music Choice seeking to strike: (1) certain paragraphs from the written rebuttal testimony of Dr. George Ford<sup>1</sup> and (2) SoundExchange's designated testimony from the *SDARS I* proceeding, in particular, the direct and rebuttal testimony of Mark Eisenberg, the direct testimony of Lawrence Kenswil and the rebuttal testimony of Charles Ciongoli. Sirius XM subsequently joined the Motion to Strike filed by Music Choice, seeking to strike additional portions of SoundExchange's designated testimony from the *SDARS I* proceeding, in particular, the rebuttal testimony of Bruce Elbert.

*1. Paragraphs 5(a), 5 (d), 6-14, 43-53, 71, 81-86 and Table 6 (referenced in paragraph 80) of the Rebuttal Testimony of Dr. George Ford.*

Music Choice's Motion to Strike certain paragraphs of Dr. Ford's written rebuttal testimony divides the paragraphs that are the focus of its motion into four categories and SoundExchange's opposition similarly addresses each of these categories in turn.

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<sup>1</sup>The paragraphs of Dr. Ford's testimony which Music Choice seeks to strike are not consistently identified throughout the pleading submitted by Music Choice. In the Introduction to its Motion, Music Choice identifies the paragraphs sought to be struck as "paragraphs 5(a), 5(d), 6-14, 17-21, 28, 71 and 81-86." See Music Choice Motion to Strike at 1. Yet, Music Choice never again refers to paragraphs 17-21 or 28 in its supporting argument or in the requested relief it seeks in its Conclusion. Thus, because it fails to provide any basis for striking paragraphs 17-21, 28, the request stated in its Introduction is DENIED. However, inasmuch as the substantive arguments in its Motion are directed toward paragraphs 5(a), 5 (d), 6-14, 43-53, 71, 81-86 and Table 6 (referenced in paragraph 80) and because Music Choice specifically asks that the Judges strike paragraphs 5(a), 5 (d), 6-14, 43-53, 71, 81-86 and Table 6 from the Ford Rebuttal Testimony in the relief requested in its Conclusion (*see* Music Choice Motion to Strike at 13) and its Reply Memorandum, the Judges hereinabove limit their consideration of the Music Choice request accordingly.



First, Music Choice seeks to strike paragraphs 5(a), 6-14 of Dr. Ford's written rebuttal testimony on the subject of the relationship between relative usage intensity and an appropriate royalty rate, as an untimely amendment to his written direct testimony wherein he first made reference to such a relationship. SoundExchange argues for the retention of these paragraphs as proper rebuttal that shows the consequences of Music Choice's expert witness' failure to take into account the relative intensity of usage in establishing an appropriate royalty rate. Mere reference to the subject of relative usage intensity in Dr. Ford's written direct testimony does not disqualify rebuttal testimony on the same subject where the rebuttal testimony attempts to show a nexus between the subject in question (here, relative usage intensity) and a purported shortcoming in the approach taken by Music Choice's expert witness, Dr. Crawford, in his direct testimony. The Judges find that paragraphs 5(a) and 6-12 arguably attempt to show the consequences of Dr. Crawford's not taking relative intensity of usage into account in analyzing what constitutes an appropriate royalty rate. However, paragraphs 13-14 of Dr. Ford's written rebuttal testimony, which offer generalized opinions about the purported competitive advantages afforded Music Choice as compared to firms operating as new subscription services pursuant to 37 C.F.R. § 383.3(a), stray so far from focusing on the subject of relative usage intensity and the direct testimony it is offered to rebut as to be nothing more than an untimely addition to his written direct testimony.

Second, Music Choice seeks to strike paragraphs 5(d), 43-53 and 71 of Dr. Ford's written rebuttal testimony that deal with the subject of the ownership structure of Music Choice, as an untimely amendment to his written direct testimony.<sup>2</sup> Music Choice argues that, having had the information that is the basis of the rebuttal testimony available through discovery, the appropriate place for this testimony was in a timely amendment to Dr. Ford's written direct testimony. SoundExchange argues that Dr. Ford's rebuttal testimony related to the subject of Music Choice's ownership structure properly rebuts the direct testimony of two Music Choice witnesses (Mr. Del Beccaro and Dr. Crawford). Although our rules at 37 C.F.R. § 351.4(c) permit a party to timely amend written direct statements based on new information gleaned through discovery, no party is precluded from using the discovered information in proper rebuttal when, as here, the party's witness is offering an expert opinion based on previously discovered information and that expert opinion is responding to issues raised in the direct testimony of witnesses for the party opposite. Indeed, notwithstanding the availability of discovered information, an expert witness would have to be blessed with extraordinary prescience to be able to offer *responsive opinions in advance* of the completion of the direct testimony and examination of the witnesses opposite. Here, the Judges find that Dr. Ford's written rebuttal testimony, at paragraphs 5(d), 43-53 and 71, unambiguously opines on issues raised by Mr. Del Beccaro and Dr. Crawford in their direct testimony and, as such, represents proper rebuttal.

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<sup>2</sup> The paragraphs of Dr. Ford's testimony which Music Choice seeks to strike are not consistently identified even within the portion of its pleading limited to the subject of ownership structure; Music Choice alternately identifies the paragraphs sought to be struck, first as "paragraphs 5(d), 43-53 and 71" (Music Choice Motion to Strike at 4) and later as "paragraphs 5(d), 6-14 and 71" (Music Choice Motion to Strike at 5). However, inasmuch as the substantive arguments in its Motion are directed toward paragraphs 5(d), 43-53 and 71, the Judges limit their consideration hereinabove of the Music Choice request accordingly.

Third, Music Choice seeks to strike paragraphs 81 and Table 6 (first referenced in paragraph 80) of Dr. Ford's written rebuttal testimony that deal with the subject of SoundExchange's proposed 45% royalty rate, as an untimely amendment to his written direct testimony. Music Choice again argues that, having had the information that is the basis of the rebuttal testimony available through discovery, the appropriate place for this testimony was in a timely amendment to Dr. Ford's written direct testimony. SoundExchange responds that Dr. Ford's rebuttal testimony, which opines on the impact of SoundExchange's proposed rate on Music Choice, properly rebuts the direct testimony of Mr. Del Beccaro and, if Dr. Ford's views as expressed in his rebuttal testimony are stricken, then SoundExchange would be denied the opportunity to rebut direct testimony elicited by counsel for Music Choice during his direct examination. In this instance, as in the one directly hereinabove, the Judges find that Dr. Ford's written rebuttal testimony, at paragraph 81 and Table 6 (first referenced in paragraph 80), unambiguously opines on issues raised by a Music Choice witness (Mr. Del Beccaro) in his direct testimony and, as such, represents proper rebuttal.

Fourth, Music Choice seeks to strike paragraphs 82 - 86 of Dr. Ford's written rebuttal testimony as an untimely amendment to his written direct testimony inasmuch as it deals with the subject of a greater-of rate structure or, in the alternative, as irrelevant. Music Choice maintains that Dr. Ford's opinions in these paragraphs rebut no Music Choice direct testimony, but rather are an irrelevant expansion of views briefly alluded to in his direct testimony concerning the supposed benefits of a greater-of rate structure (a rate structure which has not been proposed by either SoundExchange or Music Choice in this proceeding). SoundExchange responds that Dr. Ford's opinions on the subject are aimed at rebutting Music Choice's claims of financial difficulty and seeks to make the connection by reference to paragraph 13 of his written rebuttal testimony. In addition, SoundExchange argues that Dr. Ford's discussion of greater-of rate structures may very well become relevant to this proceeding, because SoundExchange may properly amend its rate proposal structure at any time prior to its submission of Findings of Fact (SoundExchange Opposition to Motion to Strike at 7-8). Sound Exchange offers no direct testimony by Music Choice witnesses that Dr. Ford expressly responds to with his opinion that a greater-of rate structure is desirable. Furthermore, SoundExchange's attempt to bootstrap on the basis of paragraph 13 of Dr. Ford's written rebuttal testimony is inapposite as the Judges have hereinabove granted Music Choice's motion to strike with respect to Dr. Ford's paragraph 13. Finally, SoundExchange's argument that *any* expert opinion is relevant so long as it is possible that a *future* rate proposal *may* embody it, must be rejected. No expert opinion becomes relevant simply on the basis of vague possibilities.

**Wherefore**, Music Choice's Motion to Strike is **GRANTED** with respect to paragraphs 13, 14, 82, 83, 84, 85, and 86 of Dr. Ford's written rebuttal testimony and **DENIED** with respect to paragraphs 5(a), 5(d), 43-53, 71, 81 and Table 6 (referenced in paragraph 80).


*2. SoundExchange's Designated Testimony From the SDARS I Proceeding  
Submitted as Volume 5 of the Written Rebuttal Statement of SoundExchange, Inc.*

Music Choice seeks to strike SoundExchange's designated testimony from the *SDARS I* proceeding, in particular, the direct and rebuttal testimony of Mark Eisenberg, the direct testimony of Lawrence Kenswil and the rebuttal testimony of Charles Ciongoli, maintaining that this testimony: (1) lacks subject matter relevance and (2) cannot properly be used against Music Choice because any such use would be unfair, improper and inconsistent with the requirements of 37 C.F.R. § 351.4(b)(2). Sirius XM, joining the Motion to Strike filed by Music Choice, seeks to strike additional portions of SoundExchange's designated testimony from the *SDARS I* proceeding, in particular, the rebuttal testimony of Bruce Elbert, arguing that 37 C.F.R. § 351.4(b)(2) permits such designated testimony as part of a party's direct statement, but not as part of its rebuttal statement. SoundExchange, in opposition, responds that Music Choice's motion to strike (and, by extension, that of SiriusXM) is premature until such time as SoundExchange makes a proffer of relevance when it seeks admission of the designated testimony. SoundExchange also maintains that, contrary to Music Choice's arguments, its designated testimony is relevant and that Music Choice's due process concerns are unfounded; and, further, that SiriusXM's interpretation of 37 C.F.R. § 351.4(b)(2) is unfairly narrow.

The Judges agree that until such time as SoundExchange makes a proffer of relevance when it seeks admission of the designated testimony, both Music Choice's and SiriusXM's motions to strike are premature. In the interest of judicial efficiency, the Judges will postpone consideration of both questions of relevancy and other questions raised by the moving parties until admission of the designated testimony is sought by SoundExchange.

**Wherefore**, Music Choice's Motion to Strike and SiriusXM's Motion to Strike are **DENIED** with respect to SoundExchange's designated testimony from the *SDARS I* proceeding, in particular, the direct and rebuttal testimony of Mark Eisenberg, the direct testimony of Lawrence Kenswil and the rebuttal testimony of Charles Ciongoli and the rebuttal testimony of Bruce Elbert.

**SO ORDERED.**

  
Suzanne M. Barnett  
Chief Copyright Royalty Judge

DATED: August 3, 2012

# Exhibit B

Capital Reporting Company  
Determination of Rates and Terms 08-16-2012 - Vol. XIV

3781

UNITED STATES COPYRIGHT ROYALTY JUDGES

Washington, D.C.

- - - - -X

In the Matter of: ) Volume XIV  
Determination of Rates and Terms ) Pgs. 3781-3879  
for Preexisting Subscription ) Pgs. 3889-3896  
Services and Satellite Digital ) Pgs. 3902-3944  
Audio Radio Services ) Pgs. 3981-3999

- - - - -X

Washington, D.C.

Thursday, August 16, 2012

The following pages constitute the  
proceedings held in the above-captioned matter, held  
at the Library of Congress, Madison Building, 101  
Independence Avenue, Southeast, Washington, D.C.,  
before Susan L. Ciminelli, CRR, RPR, Court Reporter,  
of Capital Reporting, a Notary Public in and for the  
District of Columbia, beginning at 9:35 a.m.

Capital Reporting Company  
Determination of Rates and Terms 08-16-2012 - Vol. XIV

3785

1 P R O C E E D I N G S

2 JUDGE BARNETT: The first order of  
3 business is to rule on the SoundExchange motion to  
4 exclude certain portions of Dr. Salinger's testimony.  
5 The judges find that the paragraphs referred to in  
6 appendix C of Dr. Salinger's rebuttal testimony are  
7 not responsive to issues raised in direct testimony  
8 of the opposing party, and the motion is granted.

9 MR. LARSON: May I approach?

10 JUDGE BARNETT: You may.

11 WHEREUPON,

12 MICHAEL A. SALINGER,  
13 called as a witness, and having been first duly  
14 sworn, was examined and testified as follows:

15 DIRECT EXAMINATION

16 BY MR. LARSON:

17 Q. Good morning, Professor Salinger.

18 A. Good morning.

19 Q. Could you please state your full name for  
20 the record?

21 A. Michael Alvin Salinger.

22 Q. And what is your occupation?

# Exhibit C

Before the  
COPYRIGHT ROYALTY BOARD  
LIBRARY OF CONGRESS  
Washington, D.C.

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In the Matter of: |

The Digital Performance Right |  
in Sound Recordings and |  
Ephemeral Recordings |

Docket No.  
2005-1 CRB DTRA

(Webcasting Rate Adjustment  
Proceeding) |  
-----+

Volume 43

Room LM-414  
Library of Congress  
First Street and  
Independence Avenue, S.E.  
Washington, D.C. 20540

Wednesday,  
November 22, 2006

The above-entitled matter came on  
for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge  
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge  
THE HONORABLE STAN WISNIEWSKI, Judge



1 in the section there is absolutely no citation  
2 to or reference to any claim made by any of  
3 the service's witnesses and therefore we  
4 believe that SoundExchange is taking the  
5 opportunity just to amplify their direct case  
6 at this point.

7 CHIEF JUDGE SLEDGE: Mr. Handzo?

8 MR. HANDZO: Your Honor, it seems  
9 to me that what's being advocated here is a  
10 highly cramped notion of what rebuttal is that  
11 I don't think would hold anywhere.

12 As I recall the Board's  
13 regulations, it does not define what rebuttal  
14 is. It simply says you submit a rebuttal  
15 case, but it actually doesn't say anything at  
16 all about particular requirements that have to  
17 be met. So technically, under the  
18 regulations, I certainly don't think there's  
19 any violation here. But I also think that it  
20 is really a far too restricted notion to say  
21 if there are issues that are addressed in the  
22 opening phase, whether they come up in the

1 direct examination or whether they come up on  
2 cross examination, the notion that you can't  
3 respond to them in the rebuttal case seems to  
4 me to be far too narrow a definition of  
5 rebuttal.

6 Nobody is contesting that these  
7 issues were raised and were discussed and  
8 issues came up in the opening phase. The only  
9 question is who brought them up. That doesn't  
10 seem to me to have anything whatsoever to do  
11 with whether this is proper rebuttal.

12 JUDGE ROBERTS: It's what you're  
13 responding to, I guess, Mr. Handzo, is the  
14 question that I have in my mind. The way I'm  
15 seeing it is that Mr. Griffin made a number of  
16 statements in his direct presentation about  
17 wireless services. Certainly, there was some  
18 cross examination on that. I acknowledge that  
19 probably some of it is well, you know, really  
20 how developed is it and is it really coming,  
21 Mr. Griffin? And now the testimony, some of  
22 it seems to be oh yes, it really is coming,

1 but at the same time a lot of it does seem to  
2 be a repeat of what was in the direct case.

3 In the interest of moving things  
4 along, we would be interested in hearing  
5 testimony that oh yes, it's really coming and  
6 here's why.

7 MR. HANDZO: Let me put those  
8 questions to the witness, Your Honor. And  
9 I'll move it along.

10 CHIEF JUDGE SLEDGE: All right,  
11 we'll take a 10-minute recess in which we'll  
12 consider the objections.

13 MR. HANDZO: Thank you.  
14 (Off the record.)

15 CHIEF JUDGE SLEDGE: After  
16 deliberation and review of the statement in  
17 Section 2, the Court concludes that the  
18 section does not address matters raised by the  
19 Services in their direct cases and the  
20 objections are sustained.

21 Further, the Court exercises its  
22 discretion to be able to solicit evidence and

1 using that discretion, the Court directs  
2 SoundExchange to proceed with questions,  
3 limited to evidence that has occurred  
4 subsequent to the submission of the direct  
5 written statements.

6 BY MR. HANDZO:

7 Q Mr. Griffin, let's go back to the  
8 subject of wireless technology and I want to  
9 ask you some questions about the growth of  
10 wireless networks. And again, as you've just  
11 heard the Court's ruling, so what I want to  
12 focus you on is the growth of wireless  
13 networks that has occurred since the time that  
14 you submitted your original testimony in this  
15 case back in October a year ago. Okay?

16 A Yes.

17 Q And let me just ask you broadly,  
18 what has happened in terms of the growth of  
19 wireless networks since that time?

20 A Well, there's been a number of  
21 significant developments. I'd say probably  
22 one of the most relevant for this proceeding

# Exhibit D

Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
Washington, D.C.

In the Matter of:

Determination of Rates and Terms for  
Preexisting Subscription Services and  
Satellite Digital Audio Radio Services

Docket No. 2011-1  
CRB PSS/Satellite II

**SOUNDEXCHANGE'S MOTION TO STRIKE PORTIONS OF SIRIUS XM  
TESTIMONY AS IMPROPER REBUTTAL**

Sound Exchange respectfully moves this Court to strike portions of Sirius XM's rebuttal case on the basis that it is improper rebuttal testimony.

This Court has made clear in this proceeding and in prior proceedings that rebuttal testimony is not an opportunity to submit new direct testimony; rather, rebuttal testimony must respond to issues raised by the direct testimony of an opposing party. *See, e.g., Order Granting in Part and Denying in Part Music Choice's Motion To Strike*, Docket No. 2011-1 CRB PSS/Satellite II, at 2 (Aug. 3, 2012) (striking rebuttal testimony for "stray[ing] so far from focusing on the . . . direct testimony it is offered to rebut as to be nothing more than an untimely addition to [the witness's] written direct testimony"); *In re Digital Performance Rights in Sound Recordings and Ephemeral Recordings*, Docket No. 2005-1 CRB DTRA, 11/22/06 Tr. Vol. 43 at 79:15-81:5 (sustaining an objection to testimony that "does not address matters raised by the Services in their direct case") (attached hereto as Ex. A). Here, portions of the rebuttal testimony of four Sirius XM witnesses violate this requirement and must be struck.

First, SoundExchange moves to strike the following sections of Mr. Frear's, Mr. Gertz's, and Prof. Noll's rebuttal testimony that deal with the direct licenses between Sirius XM and independent music labels:

- Written Rebuttal Testimony of Mr. Frear ("Frear WRT"): ¶¶ 3–6 and 8–12;
- Written Rebuttal Testimony of Mr. Gertz ("Gertz WRT"): ¶¶ 2–5, the portions of ¶ 8 that deal with licenses other than licenses of the type discussed in Sirius XM's direct testimony, and ¶¶ 9–14;
- Written Rebuttal Testimony of Prof. Noll ("Noll WRT"): the sections entitled "Appropriate Benchmarks" (except the first sentence) and "The Sirius XM Direct License Benchmark" (pp. 2–3, pp. 29–38).<sup>1</sup>

Second, SoundExchange moves to strike paragraphs C9 to C16 of Appendix C to Professor Salinger's Written Rebuttal Testimony ("Salinger WRT") because this section does nothing more than revise calculations offered by Sirius XM during the direct phase in an attempt to strengthen Sirius XM's own direct-phase testimony. The purpose of the rebuttal phase is to respond to claims made by opposing parties. Because the aforementioned testimony does not rebut anything in SoundExchange's direct case and SoundExchange would be severely prejudiced by its admission at this stage of the proceeding when it serves only to buttress Sirius XM's own direct case, it should be struck.

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<sup>1</sup> In this motion, SoundExchange is not moving to strike as improper rebuttal Mr. Gertz's ranked market share analysis, which was performed at the request of the Copyright Royalty Judges ("CRJs"), or Mr. Frear's claim that Sirius XM will continue to seek direct licenses after this proceeding, which responds to a question from the CRJs.

## ARGUMENT

### **I. Direct License Testimony**

In their written rebuttal testimony, Mr. Frear (Frear WRT at 1–5), Mr. Gertz (Gertz WRT at 1–14), and Prof. Noll (Noll WRT at 32–38) engage in extensive discussions about the direct licenses between independent labels and Sirius XM. While Sirius XM is entitled to respond to this Court’s explicit request to present the top twenty-five labels played on Sirius XM’s satellite radio service, *see* 6/7/12 Tr. 686:19–687:1 (Frear), these witnesses’ testimony exceed the scope of that request. They present an elaborate defense of the representativeness of the independent labels, the sophistication of the negotiations, the variations to the standard license permitted by Sirius XM, and the appropriateness of these licenses as a benchmark – all of which fails to respond to any element of SoundExchange’s direct case.

Indeed, the only mentions of direct licenses during SoundExchange’s direct case were Prof. Ordovery’s acknowledgment that he had become aware of the direct licenses through reading Prof. Noll’s direct testimony, *see* 6/14/2012 Tr. 2252:2–11, and Mr. Van Arman’s (Jagjaguar) explanation of his reasons for not accepting the direct license offered to his labels, *see* 6/15/2012 Tr. 2552:11–2555:20. But Sirius XM’s “rebuttal” testimony does not even attempt to respond to that testimony. Instead, it is offered only to bolster Sirius XM’s own direct testimony and as preemptive sur-rebuttal of attacks on the direct licenses anticipated by Sirius XM.

Moreover, while Sirius XM is entitled to submit testimony at this stage responding to specific questions raised by the Court, that does not grant Sirius XM wholesale authority to provide amended direct testimony on issues not responsive to the Court’s questions. For example, during the direct phase, Sirius XM’s witnesses were questioned about the market share

of plays on the SDARS service represented by the direct license labels. At that hearing, Mr. Gertz asserted that the prior market share analysis performed by MRI, which formed the basis of Sirius XM's direct license initiative, was "several years old. And it wasn't an authoritative analysis. . . . So the best data for doing what you're doing would probably be the most—analysis of most current royalty data." 6/7/2012 Tr. 906:6-20 (Gertz). Judge Roberts then suggested that "that would certainly be something worthy in the rebuttal phase." *Id.* at 906:21-207:1. But a suggestion or question by the Court of the kind made by Judge Roberts does not open the door to the extensive revisiting of the direct licensing initiative that appears in Sirius XM's rebuttal testimony.

Rebuttal is defined as "the giving of evidence in a legal suit to destroy the effect of evidence introduced by the other side in the same suit." *Webster's Third New International Dictionary* (1993). Proper rebuttal responds to the other side's evidence rather than bolstering the original argument of the party offering the rebuttal testimony. *See, e.g., Peals v. Terre Haute Police Dept.*, 535 F.3d 621, 630 (7th Cir. 2008) ("The proper function of rebuttal evidence is to contradict, impeach or defuse the impact of the evidence offered by an adverse party." Testimony offered only as additional support to an argument made in a case in chief, if not offered 'to contradict, impeach or defuse the impact of the evidence offered by an adverse party,' is improper on rebuttal.") (quoting *United States v. Grintjes*, 237 F.3d 876, 879 (7th Cir. 2001)); *United States v. Allard*, 464 F.3d 529, 535 (5th Cir. 2006) ("[I]t is well settled that the purpose of rebuttal testimony is to explain, repel, counteract, or disprove the evidence of the Adverse party. . . ."); *United States v. Frazier*, 387 F.3d 1244, 1269 (11th Cir. 2004) (same); *La Esperanza de P.R., Inc. v. Perez y Cia. de Puerto Rico, Inc.*, 124 F.3d 10, 20 n.6 (1st Cir. 1997) ("The purpose of rebuttal is to meet and reply to any new evidence offered by an opponent."); *United States v.*

*Carter*, 70 F.3d 146, 149 (DC Cir. 1995) (“Rebuttal evidence is admitted for the purpose of explaining or refuting evidence offered by the other side.”).

In their discussion of direct licenses, Mr. Frear, Mr. Gertz, and Prof. Noll fail to meet this elementary requirement. Indeed, these witnesses make no attempt to tie their discussions to specific aspects of SoundExchange’s direct case; instead, they reiterate Sirius XM direct testimony or rely on generalized references to SoundExchange’s “suggest[ions],” “questions,” or “contentions,” without any citations to the record. *See* Frear WRT at ¶ 5; Gertz WRT at ¶ 1.

**A. Frear**

Mr. Frear writes in his rebuttal testimony, “I understand that SoundExchange suggested during the direct phase hearing that there is some sort of informational imbalance as between Sirius XM and the independent labels with which it has reached direct licenses.” Frear WRT at ¶ 5. A search for any such suggestion in the direct testimony, whether written or oral, of SoundExchange witnesses would be fruitless. It was Mr. Frear himself who referred during his direct examination to “independent labels, who, you know, some people think—seem to think are unsophisticated.” 6/7/2012 Tr. 675:11-14. Later in his direct examination, counsel for Sirius XM specifically elicited testimony as to whether Mr. Frear had “form[ed] any impression of the sophistication of the counterparties that you dealt with.” He answered, “Yeah. Yeah. These guys know their business, you know, so—not only the ones who sign the licenses, but even the ones who don’t, and so that we have real business discussions with people who understand where we fit in—you know, in their business—business scheme.” 6/7/2012 Tr. 683:22-684:8.

If any other “suggest[ion]” regarding the informational gap between the direct licensors and Sirius XM arose during the direct phase hearing, it surfaced not during the presentation of SoundExchange’s direct evidence, but during cross-examination of Prof. Noll. Counsel for

SoundExchange asked if Prof. Noll knew whether any of the direct licensors had participated in proceedings before the Copyright Royalty Board, and Prof. Noll answered that “the chances that any of them have a witness here is zero.” 6/6/2012 Tr. 337:8-338:2. Then counsel for SoundExchange asked Prof. Noll to contrast that answer with Sirius XM’s participation in both the *SDARS I* and *SDARS II* proceedings. *Id.* at 338:3-8. Prof. Noll later stated defensively, “It’s not that there was an information-impacted environment here. There were lots of people telling them what they thought the outcome of this process would be.” *Id.* at 340:4-7.

The fact that a “suggest[ion]” of informational asymmetry arose on cross-examination of another Sirius XM witness does not open the door for Sirius XM to submit rebuttal testimony on that subject. *See Ex. A, In re Digital Performance Rights in Sound Recordings and Ephemeral Recordings*, Docket No. 2005-1 CRB DTRA, 11/22/06 Tr. Vol. 43 at 79:15-81:5 (sustaining an objection to SoundExchange testimony that responded to issues raised only on cross-examination); *Peals v. Terre Haute Police Dept.*, 535 F.3d at 630 (holding that where “the testimony that [the plaintiff] sought to introduce on rebuttal was responsive to the defendants’ cross-examination of him during his case in chief, not to the defendants’ case,” such testimony “was clearly not an appropriate subject for rebuttal” and the district court had properly excluded it). This rule serves the adversarial process because it encourages rigorous testing of the direct-case theories of the opposing party without the cross-examining party thereby inviting retooled and un rebuttable testimony on the same subject during the rebuttal phase. Moreover, it keeps the rebutting party from mischaracterizing the other party’s position—a distinct risk when rebutting parties attempt to parse the cross-examination questions of their opponents. Because Mr. Frear’s WRT ¶ 5 responds only to issues raised by himself on direct examination and on cross-examination of Prof. Noll, it should be struck.



Similar deficiencies are present in Mr. Frear's discussion of direct licenses in WRT ¶¶ 3, 4, 6, and 8-12 (though not ¶¶ 7 and 13, which respond to questions from the Copyright Royalty Judges).

*Paragraph 3.* Paragraph 3 does not even hint at an issue raised on cross examination, but merely reiterates Prof. Noll's contention from the direct phase that the direct licenses represent the most appropriate benchmark because they feature the same buyer, sellers, and rights as the statutory license. *See* Noll Revised Amended Written Direct Testimony ("Noll WDT") at 49 ("Unlike the benchmarks that have been used in all prior proceedings before the Copyright Royalty Board, these agreements include the same rights for the same buyer from the same sellers as the licenses that are at issue in this proceeding.").

*Paragraph 4.* In ¶ 4, Mr. Frear refers vaguely to SoundExchange's "attempts to denigrate the direct licenses as outliers that do not inform the value of the statutory licenses that is in issue here," Frear WRT at 2, but SoundExchange's direct case contains no such "denigrat[ion]." As previously discussed, SoundExchange's direct case did not so much as name any particular direct licensor. Rather, the only challenge to the probative value of the direct licenses during the direct phase came during cross-examination questions addressing the miniscule market share represented by the direct licensors, *see, e.g.*, 6/7/2012 Tr. 899:6-21 (Gertz); *id.* at 905:6-9, and the fact that at least one direct licensor represented to MRI that his artist contracts did not require him to share royalties with artists, *id.* at 888:6-20.

Paragraph 4 also reiterates Sirius XM's dubious direct-phase assertions that SoundExchange somehow prevented parties from entering into direct licenses. *See* Frear WDT at 26-29; Noll WDT at 49-55. These assertions were never addressed in SoundExchange's direct case, though counsel for SoundExchange did elicit testimony from Prof. Noll on cross-

examination to the effect that Prof. Noll did not have a problem with trade associations' public estimates about the likely outcome of this proceeding. 6/7/2012 Tr. 339:11-341:9 (Noll).

*Paragraphs 6 and 8-12.* Mr. Frear's ¶ 6 is devoted to the deviations from the direct license that certain direct licensors secured, while ¶¶ 9-11 renew complaints about the fact that the major record labels declined to enter into direct licenses; neither topic was addressed in SoundExchange's direct case. Paragraph 12 discusses Sirius XM's implementation of mechanisms that favor direct licensed sound recordings. Clearly, SoundExchange did not and could not have given direct evidence on this subject.

Although Sirius XM is entitled to put on evidence specifically requested by the Copyright Royalty Judges (as Mr. Frear does in ¶¶ 7 and 13), the market share discussions in ¶ 8 and all but the last sentence of ¶ 10 go beyond the question asked by Judge Roberts of Mr. Gertz during the direct-phase hearing. Rather than analyze the same record company direct licenses that had been discussed in Sirius XM's direct case, using the actual data from royalty statements made to those direct licensors (statements that Mr. Gertz had argued would provide the "best data"), MRI produced a new analysis from whole cloth that takes into account the market share of other licenses between Sirius XM and disparate content owners (for example, content broadcast on the Metropolitan Opera channel, Jimmy Buffet's Margaritaville, and Book Radio). Frear WRT at 4 & n.2. This is not a response to Judge Roberts's question, but is instead an alternative and entirely new theory that affects everything from Prof. Noll's benchmark analysis to the specific numbers discussed by Mr. Frear and Mr. Gertz. Moreover, by introducing new "direct licenses" that are entirely separate from the previously discussed direct licensing initiative, this testimony hamstringing SoundExchange's ability to provide effective rebuttal testimony.

Unsurprisingly, federal courts have held that such midstream changes in legal theory constitute improper rebuttal. In *Allen v. Prince George's County, Md.*, 737 F.2d 1299 (4th Cir. 1984), the Fourth Circuit affirmed a district court's refusal to admit in rebuttal the plaintiffs' offer of a revised statistical analysis adopting a timeframe that mirrored that of their opponents' statistical analysis—even though the district court had accepted the original timeframe of the opponents and rejected that of the plaintiffs. *Id.* at 1305–06. Citing *Wigmore on Evidence*,<sup>2</sup> the Fourth Circuit approved of the district court's reasoning that “the appellants had had a chance to decide before trial what statistics to use, [ ] they had elected to include pre-1972 hires, and [ ] they should not be allowed to change their litigation strategy on rebuttal.” *Id.* at 1305. The same reasoning applies to Sirius XM. If Sirius XM wanted to present analysis including the Book Radio licenses as relevant direct licenses in its written direct testimony it had the chance to present and defend this legal theory during the direct phase. In rebuttal, however, this alternate legal theory constitutes improper rebuttal that would unfairly prejudice SoundExchange, and the testimony should therefore be struck.

**B. Mr. Gertz**

Mr. Gertz's rebuttal testimony on the topic of direct licenses is improper for the same reasons and to the same extent as Mr. Frear's. Paragraphs 2 through 5 merely renew Sirius XM's direct-phase arguments about the representativeness of the direct licensors (§ 2, § 5) and defend the quality and results of negotiations with various direct licensors (§ 3 & nn.2–4, § 4). None of these topics was addressed in SoundExchange's direct case. Paragraphs 6–7 and the market share analysis in Table 1 respond to Judge Roberts' request (although the table does not

---

<sup>2</sup> The Fourth Circuit ultimately relied on evidentiary rules specific to Title VII cases, *see Allen*, 737 F.2d at 1305, but its primary discussion is devoted to the common law of evidence. *See also Tramonte v. Fireboard Corp.*, 947 F.2d 762, 764 (5th Cir. 1991) (citing *Allen*'s holding on new legal theories in rebuttal in the context of a tort suit).

employ MRI's royalty data or provide estimates for Sirius XM's satellite radio service), but the statistics in ¶ 8 and footnote 6 suffer from the same impermissible change in legal theory identified in Mr. Frear's testimony, above. Any discussion of numbers that do not derive from Sirius XM's direct licenses with independent record labels is impermissible rebuttal and should be struck. Moreover, ¶ 9 of Mr. Gertz's testimony parrots Mr. Frear's rehashing of his own direct testimony about the purported unwillingness of the major labels to negotiate with Sirius XM in the guise of offering yet another new way to analyze the paltry market share of the direct license labels.

Like ¶ 4 of Mr. Frear's testimony, Mr. Gertz's assertions about supposed SoundExchange interference with direct licenses in ¶¶ 10–14 merely expands on testimony from Sirius XM's direct case rather than responding to SoundExchange's evidence. *See* Frear WDT at 26–29; Noll RAWDT at 49–55; Gertz WDT ¶¶ 17–18. It is telling that nearly all of the communications that Mr. Gertz discusses and attaches as Exhibits are communications with MRI *prior* to the filing of the written direct case. *See, e.g.*, Exhibits 30, 31, 32, 34.<sup>3</sup> This testimony is nothing short of a blatant attempt to amend and bolster Mr. Gertz's prior testimony regarding SoundExchange's alleged interference. *See* Gertz WDT ¶¶ 17–18. Indeed, Mr. Gertz does not even pretend to respond to any of SoundExchange's testimony. If Mr. Gertz wished to discuss these communications, the time to do so was plainly during the direct phase. Mr. Gertz's testimony on SoundExchange "interference" fails to respond to SoundExchange's evidence and is thus improper on rebuttal.

---

<sup>3</sup> All of the communications discussed by Mr. Gertz are MRI and Sirius XM's own documents. That a handful of these communications were received by MRI shortly after the direct case was filed does not grant Sirius XM authority to amend its written direct testimony through rebuttal testimony.

### C. Prof. Noll

Prof. Noll rehearses his direct-case arguments about the appropriateness of his direct-license benchmark from page 2 (beginning with “I continue to believe the most appropriate benchmarks . . .”) to page 3 (the end of the section), and from page 29 (the section titled “The Sirius XM Direct License Benchmark”) through page 38 (ending with “I conclude that these licenses are representative of the industry in coverage of music and rates paid”). These sections should be struck because they repeat and expand upon Prof. Noll’s direct testimony and because they do not respond to anything in SoundExchange’s direct case.

Prof. Noll’s central argument pertains to the “representativeness” (p. 32) of the direct licensors (pp. 32 to 38). This argument played a critical role in the Revised Amended Written Direct Testimony of Roger G. Noll. See Noll WDT at 39–45. Under the heading “The Similarity of Sirius XM’s Licensees [sic] to Other Record Companies” (WDT at 39), Prof. Noll’s direct testimony analyzed the “type and quality” (WDT at 42) of the recordings owned by the direct licensors, concluding that “the recordings of the companies that have signed direct licenses with Sirius XM are representative of the type and quality of recordings that are released by a major record company” (WDT at 45). SoundExchange made no mention of the representativeness of the direct licensors in its direct case.

Prof. Noll also devotes a great deal of rebuttal testimony to “market rejection” (pp. 30–32) of the direct licenses. While counsel for SoundExchange elicited testimony on the proportion of independent record labels that declined the direct-license offer during cross-examination, *see* 6/6/2012 Tr. 309:17–310:9 (Noll), neither the number of direct licensors nor the number of labels that rejected the direct license appeared in SoundExchange’s direct case. Moreover, this testimony is based on a handful of documents that were produced by

SoundExchange well in advance of the direct trial in this case and that could have been used by Prof. Noll in amending his testimony.<sup>4</sup> In fact, at least one of the emails was featured in Sirius XM's opening statement. *See* 6/5/2012 Tr. 48:9-18 (Sirius XM Opening). Testimony that responds only to issues raised on cross-examination or simply bolsters direct testimony is improper rebuttal and should be struck.

## **II. Prof. Salinger on Depreciation**

In the body of his rebuttal testimony, Prof. Salinger superficially attempts to rebut Mr. Sidak's calculation of Tobin's  $q$ . In fact, Prof. Salinger uses the majority of his Appendix C to amend Mr. Frear's direct testimony about the depreciation and amortization expenses that Sirius XM incurred in 2010 (p. 12, ¶ 29, Frear WDT), and in turn to revise Mr. Noll's direct testimony about the annualized costs per user of satellite radio transmission (p. 85 & Appendix C, Noll WDT). As ¶ C16 of Prof. Salinger's testimony illustrates, the ultimate thrust of his argument is an upward revision to Prof. Noll's estimate of the average cost per user of Sirius XM's distribution system. *See* Salinger WRT at 15, ¶ C16 ("My estimates of \$2.54 and \$3.13 should be compared with the sum of these two portions of Prof. Noll's total, or \$0.63. They show that Prof. Noll was intentionally conservative in his treatment of capital costs. My estimates indicate the true economic costs per subscriber month of Sirius XM's satellite network are almost \$2.00 higher than he estimated, and that is just for a small portion (\$.63 out of \$5.11 of the total costs used in his adjustments[.]"). This testimony, whether seen as an untimely correction or a blatant

---

<sup>4</sup> SoundExchange acknowledges that the direct license communications were not produced until after the deadline for filing amended testimony during the direct phase. In light of the significant time period between the production of the documents and the start of the direct phase hearing, however, Sirius XM could have sought permission from the Court to file untimely amended testimony on the basis of those documents. But Sirius XM's failure to do so should not excuse its attempt to introduce these documents and communications by means of rebuttal testimony that fails to rebut any aspect of SoundExchange's direct testimony.

attempt to bolster direct testimony, cannot be sustained as rebuttal. This Court should strike paragraphs C9 to C16.

Mr. Sidak's discussion of Tobin's  $q$  provides a wholly inadequate basis to sustain Prof. Salinger's alternate calculation of Sirius XM's costs per user. The only connection between Mr. Sidak's testimony and Prof. Salinger's Appendix C is the fact that Mr. Sidak calculated Tobin's  $q$  using Sirius XM's publicly reported financial documents. As Mr. Frear's direct testimony reflects, Sirius XM has chosen to use straight-line depreciation, a technique that is consistent but not required by GAAP. In calculating Tobin's  $q$  for Sirius XM, Mr. Sidak used the book value of the firm's assets, a figure that naturally reflects the depreciation method employed by Sirius XM itself. Other than the implicit reference to depreciation contained within this calculation, Mr. Sidak did not refer to or discuss any particular depreciation method.

Nonetheless, Prof. Salinger uses an alternate depreciation method as a springboard to conduct a thorough, fifteen-page "cost and asset value analysis" in Appendix C.<sup>5</sup> As paragraphs C9 to C16 make clear, Prof. Salinger is not actually interested in recalculating depreciation based on his methodology. Rather, this testimony is entirely devoted to bolstering Prof. Noll's analysis on the monthly cost per subscriber for Sirius XM's satellite network, a topic never discussed in any of SoundExchange's direct testimony. This testimony fails to respond to any aspect of SoundExchange's direct case; instead, it is untimely amended testimony in the guise of rebuttal and should be struck.

### CONCLUSION

For the foregoing reasons, SoundExchange respectfully moves this Court to strike the portions of Sirius XM's Written Rebuttal Testimony identified on Page 2.

---

<sup>5</sup> It is telling that Prof. Salinger does not even bother to recalculate the Tobin's  $q$  figures with what he deems to be a more accurate calculation of depreciation.

Respectfully submitted,

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August 3, 2012



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\_\_\_\_\_  
David Moskowitz

# Exhibit E

Before the  
COPYRIGHT ROYALTY JUDGES  
Washington, D.C.

\_\_\_\_\_  
In the Matter of )  
 )  
 )

ADJUSTMENT OF RATES AND TERMS )  
FOR PREEXISTING SUBSCRIPTION )  
SERVICES AND SATELLITE DIGITAL )  
AUDIO RADIO SERVICES )  
\_\_\_\_\_ )

Docket No. 2006-1 CRB DSTRA

**SOUNDEXCHANGE'S MOTION TO STRIKE SECTION II OF THE WRITTEN  
REBUTTAL TESTIMONY OF SIRIUS SATELLITE RADIO INC.'S AND XM  
SATELLITE RADIO INC.'S JOINT EXPERT JOHN R. WOODBURY**

SoundExchange, Inc. ("SoundExchange") respectfully moves this Court to strike Section II of the written rebuttal testimony of John R. Woodbury, an expert whose testimony is sponsored jointly by Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Inc. ("XM") (collectively, the "SDARS").

At the April 24, 2007 scheduling conference held in this case, the Court made abundantly clear that the rebuttal phase of this proceeding is *not* an opportunity to submit new direct evidence. Similarly, in the webcasting proceeding, this Court held that rebuttal testimony is improper when it merely responds to points raised on cross-examination. Contrary to these directives, however, Section II of Dr. Woodbury's written rebuttal statement seeks to bolster his direct testimony and does not respond to evidence presented in SoundExchange's direct case. Nor does it present new information that was unavailable at the time Dr. Woodbury presented his written direct statement. Section II of Dr. Woodbury's rebuttal testimony therefore should be struck as improper.

## ARGUMENT

In Section II of his written rebuttal testimony, Dr. Woodbury discusses “the methodology [he] used to estimate a SDARS Rate of 0.88%,” arguing that it “is sound and generally applicable for the 2007-2012 license period.” *See* Written Rebuttal Testimony of John R. Woodbury, at 6 (“Woodbury WRT”) (capitalization altered). He freely acknowledges that this section of this testimony responds to questions raised “[d]uring the course of [his] examination” regarding “the appropriateness of the PSS rate” and “the value of the Music Choice service itself and therefore the relevance of the PSS rate to the SDARS.” *Id.* at 13. He then devotes fourteen pages of his rebuttal testimony to explaining why he “believe[s] that any concerns raised by these questions are misplaced.” *Id.* at 13. But Dr. Woodbury fails to explain how any of this discussion qualifies as “rebuttal.” Nor could he, because the testimony does not rebut any evidence in SoundExchange’s direct case.

Rebuttal consists of “the giving of evidence in a legal suit to destroy the effect of evidence introduced by the other side in the same suit.” *Webster’s Third New International Dictionary* (1993). *See, e.g., United States v. Groves*, 470 F.3d 311, 328 (7th Cir. 2006) (“The purpose of rebuttal testimony is to contradict, impeach, or defuse the impact of the evidence offered by an adverse party.”); *United States v. Allard*, 464 F.3d 529, 535 (5th Cir. 2006) (“it is well settled that the purpose of rebuttal testimony is to explain, repel, counteract, or disprove the evidence of the Adverse party . . . .”); *United States v. Frazier*, 387 F.3d 1244, 1269 (11th Cir. 2004) (same); *La Esperanza de P.R., Inc. v. Perez y Cia. de Puerto Rico, Inc.*, 124 F.3d 10, 20 n.6 (1st Cir. 1997) (“The purpose of rebuttal is to meet and reply to any new evidence offered by an opponent.”). *See also* CJ Trial § 195 (“Rebuttal evidence is that which explains, disproves,

repels, contradicts, controverts, refutes, modifies, antagonizes, confutes, or counteracts evidence introduced by the opposing or adverse party.”).

Section II of Dr. Woodbury’s written rebuttal testimony fails to meet the standards for rebuttal established by this Court and by the case law. Dr. Woodbury does not refute any evidence submitted by SoundExchange. Rather, he tries to buttress the evidence and arguments that *he* submitted as part of his own testimony during the direct case presented by the SDARS. Section II of his written rebuttal testimony simply supplements his written direct testimony with evidence and arguments that he could have presented at the outset. This is clearly an improper use of rebuttal testimony. *See, e.g., Waterview Mgmt. Co. v. F.D.I.C.*, 203 F.3d 54, \*2 (D.C. Cir. 1999) (affirming the district court’s finding that testimony was “improper rebuttal because it could have been included in the same witness’ direct examination.”). *Cf. Kronisch v. Gottlieb*, 213 F.3d 626, \*3 (2d Cir. 2000) (affirming district court’s decision refusing evidence as improper rebuttal because the proffering party “knew about this evidence prior to the presentation of her case-in-chief”).

It is no answer to say that Dr. Woodbury’s written rebuttal testimony responds to questions raised by SoundExchange on cross-examination. As the cases cited above repeatedly state, proper rebuttal must respond to *evidence* submitted by the opposing party. Indeed, in the webcasting proceeding, this Court sustained an objection to rebuttal testimony on precisely this ground. SoundExchange submitted rebuttal testimony by Mr. Griffin that responded to issues raised only by cross-examination. Counsel for the Broadcasters (who is also counsel for Sirius in the instant proceeding) objected, arguing that “[t]he parties should have the right to cross examine a witness that’s been proffered on a subject to test that subject without thereby opening the door to essentially resubmission of a direct case on rebuttal.” *In re Digital Performance*

*Rights in Sound Recordings and Ephemeral Recordings*, Docket No. 2005-1 CRB DTRA, Griffin Dir. Test. Vol. 43 at 76 (Nov. 22, 2006). The Court sustained the objection, explaining that the testimony did “not address matters raised by the Services in their direct cases.” *Id.* at 80. The Court also permitted rebuttal testimony on “evidence that has occurred subsequent to the submission of the direct written statements.” *Id.* at 80-81. But that does not aid the Services here, because Section II of Dr. Woodbury’s written rebuttal statement is not based on new information.

Dr. Woodbury acknowledges, as he must, that every one of his arguments in Section II aims at questions and issues that arose during his examination and cross-examination during the direct phase of the SDARS’ case, not SoundExchange’s. He concedes that he is offering additional support for contentions set forth in his written direct testimony rather than rebutting any evidence submitted by SoundExchange. *See* Woodbury WRT ¶ 16 (concerns with the use of a PSS benchmark were suggested by SoundExchange “during the course of my cross-examination”); *id.* ¶¶ 18-20 (defending against “suggest[ions] during my examination”); *id.* ¶21 (“As I noted in my written direct testimony . . .”); *Id.* ¶ 22 (“In my original testimony . . .”). But Dr. Woodbury’s failure to persuasively present his argument in the direct phase of the SDARS’ case is not grounds for rearguing the same points in rebuttal; a cross-examination that raises questions as to the validity of his direct testimony does not afford him a second bite at the apple. *See Waterview Mgmt Co.*, 204 F.3d at \*3. *Cf. Life Plus Intern. v. Brown*, 317 F.3d 799, 804 (8th Cir. 2003) (affirming district court’s conclusion that the proffered testimony “was not proper rebuttal” but rather was an “attempt[] to get admitted through the back door of rebuttal evidence that which the district court had correctly barred as being untimely disclosed at the front door”).

Nowhere is Dr. Woodbury's failure to rebut SoundExchange's evidence more transparent than in his discussion of his own functionality adjustment. As he freely admits, the purpose of this discussion is to present the results of a test he performed on his own prior analysis. *Id.* ¶ 27. He acknowledges that this testimony is a re-analysis of his prior adjustment -- not rebuttal of evidence presented by SoundExchange: "As a result of data provided during the course of this proceeding, I have been able to test whether *my* functionality adjustment overstates or understates the percentage-of-revenue rate that forms the basis for the per play rate I later recommend for the SDARS' use of the sound recording performance rights." *Id.* (emphasis added). Since SoundExchange was wholly unaware of Dr. Woodbury's functionality adjustment when it presented its direct case, it did not address this adjustment in the direct phase of this proceeding, other than through questioning Dr. Woodbury on cross-examination. As discussed above, however, that cross-examination does not open the door for Dr. Woodbury to try to shore up his direct testimony. *See Kronisch*, 213 F.3d at \*3; *Waterview Mgmt Co.*, 203 F.3d at \*2. Thus, any discussion of Dr. Woodbury's own functionality adjustment on rebuttal is wholly improper.

In sum, Section II of Dr. Woodbury's is not proper rebuttal testimony. This Court should strike it.

### CONCLUSION

For the foregoing reasons, SoundExchange respectfully moves this Court to strike Section II of Dr. Woodbury's written rebuttal testimony.

Respectfully submitted,

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August 9, 2007



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I, Albert Peterson, hereby certify that a copy of the foregoing filing has been served this 9th day of August, 2007 by electronic mail and overnight mail to the following persons:

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---

Albert Peterson

# Exhibit F

Capital Reporting Company  
Determination of Rates and Terms 08-15-2012 - Vol. XIII

3492

UNITED STATES COPYRIGHT ROYALTY JUDGES

Washington, D.C.

- - - - -X

In the Matter of: )

Determination of Rates and Terms ) Volume XIII

for Preexisting Subscription ) Pgs. 3492-3529

Services and Satellite Digital ) Pgs. 3544-3686

Audio Radio Services ) Pgs. 3705-3716

) Pgs. 3723-3724

- - - - -X Pg. 3781

Washington, D.C.

Wednesday, August 15, 2012

The following pages constitute the  
proceedings held in the above-captioned matter, held  
at the Library of Congress, Madison Building, 101  
Independence Avenue, Southeast, Washington, D.C.,  
before Susan L. Ciminelli, CRR, RPR, Court Reporter,  
of Capital Reporting, a Notary Public in and for the  
District of Columbia, beginning at 9:35 a.m.

Capital Reporting Company  
Determination of Rates and Terms 08-15-2012 - Vol. XIII  
Stowell - cross

3674

1 of all, it's not rebutting anything in  
2 SoundExchange's direct case. The only witness who  
3 testified about the direct licenses in our direct  
4 case was Mr. Van Arman who testified about his own  
5 experience at his one label with the direct license.

6 And I would just add -- and so Mr. Gertz's  
7 testimony is not rebutting Mr. Van Arman's testimony.  
8 And I would add finally that this is different than  
9 the motion that Dr. Noll in the following respect. I  
10 understand with Dr. Noll, there was some issue of  
11 when documents were produced by us in discovery such  
12 that he was -- he was able to use them or not.

13 Here with Mr. Gertz, he is relying on  
14 documents obtained from SiriusXM's own files. There  
15 is no issue here that they didn't have these  
16 documents. And in fact, in paragraphs six and seven,  
17 he is using documents that, using documents and  
18 talking about events that predate the filing of the  
19 written direct case.

20 So not only is it not rebutting anything  
21 in our case but this is about things that happened  
22 before the direct case was even filed. And so for

# Exhibit G

Before the

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LIBRARY OF CONGRESS

Washington, D.C.

In the matter of: °

Adjustment of Rates and °

Terms for Preexisting ° Docket No. 2006-1

Subscriptions Services, ° CRB DSTR

and °

Satellite Digital Audio °

Radio Services °

Room LM-408

Library of Congress

First and Independence Avenue, S.E.

Washington, D.C. 20540

Thursday,

August 23, 2007

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge

THE HONORABLE WILLIAM J. ROBERTS, JR., Judge

THE HONORABLE STAN WISNIEWSKI, Judge

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# T A B L E O F C O N T E N T S

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Charles Ciongoli				
By Mr. DeSanctis	195			
By Mr. Reed		209		
Janusz Ordoover				
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## P R O C E E D I N G S

9:35 a.m.

CHIEF JUDGE SLEDGE: Good morning,  
we'll come to order.

Mr. Rich?

MR. RICH: Good morning, Your  
Honor. As our next and final witness on the  
rebuttal cases of XM and Sirius, we call Dr.  
John Woodbury to the stand.

(Pause.)

CHIEF JUDGE SLEDGE: Mr. Woodbury,  
will you raise your right hand?  
WHEREUPON,

JOHN WOODBURY

WAS CALLED FOR EXAMINATION BY COUNSEL FOR THE  
SERVICES AND, HAVING FIRST BEEN DULY SWORN,  
WAS EXAMINED AND TESTIFIED AS FOLLOWS:

CHIEF JUDGE SLEDGE: Thank you.

Please be seated.

(Pause.)

CHIEF JUDGE SLEDGE: All right,  
with Dr. Woodbury's testimony we have

evidence submitted by SoundExchange during  
the direct phase of this case.

Proper rebuttal is a response to  
evidence that is submitted in the direct case  
and we've cited numbers of cases from Federal  
District Courts for that proposition and in  
their response I think the Services don't even  
attempt to argue that Section 2 of Dr.  
Woodbury's testimony is a response to evidence  
submitted during the direct phase by  
SoundExchange. I think the Services effectively  
concede that it isn't rebuttal to  
SoundExchange evidence.

Instead, what they try and do in  
their response is really expand the definition  
of rebuttal in a way that I think is  
inconsistent with case law and inconsistent  
with this Court's rulings.

First, of all the Services argue  
that Section 2 of Dr. Woodbury's report  
responds to questions asked by the Court  
during Dr. Woodbury's oral direct testimony.

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initially the motion to strike by  
SoundExchange and then if that motion is not  
granted, then we'll proceed to consider the  
motion filed by Music Choice on the  
application of the protective order for Dr.  
Woodbury's testimony.

MR. HANDZO: Your Honor, may I be  
heard on the SoundExchange motion?

CHIEF JUDGE SLEDGE: Please.

MR. HANDZO: Thank you.

CHIEF JUDGE SLEDGE: Just a  
moment, Mr. Handzo.

(Pause.)

CHIEF JUDGE SLEDGE: Thank you.

MR. HANDZO: Thank you, Your  
Honor. Your Honors, Section 2 of Dr.  
Woodbury's written rebuttal testimony from  
paragraphs 13 through 47 and the associated  
exhibits which are SDARS Woodbury 24 through  
28 are an effort to bolster Dr. Woodbury's  
original direct written testimony. It's not  
proper rebuttal. It doesn't respond to any

And the first thing to say about that is  
actually it's not quite true. As best as I  
can tell, paragraphs 22 through 31 of Section  
2 were not written in response to anyone's  
questions, not mine, and not the Court's.  
Paragraphs 13 through 21 were written in  
response to questions I asked on cross, not  
questions from the Court and actually Dr.  
Woodbury himself says so at paragraph 16. He  
says "as SoundExchange suggested during my  
cross examination" and then he goes on from  
there.

So of the portion that we're  
moving to strike, only paragraphs 32 to 47  
were written in response to questions from  
the bench. Now that said, I don't think that  
even questions from the Court asked of a  
witness testifying on direct give the witness  
a blank check to write rebuttal testimony.  
This Court has specifically held in the  
webcasting case that questions during cross  
examination do not open the door to rebuttal.